

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DANNY JOE BARBER, III,

Plaintiff,

v.

PAUL THIMONS and THIMONS LAW  
PLLC,

Defendants.

CASE NO. 3:24-CV-5723-TMC-DWC

REPORT AND RECOMMENDATION

Noting Date: October 9, 2024

Plaintiff Danny Joe Barber, III, proceeding *pro se*, filed this civil rights complaint under 42 U.S.C. § 1983. Dkt. 4-1. The Court has considered Plaintiff's proposed complaint and concludes Plaintiff has not stated a claim upon which relief can be granted. The Court also finds leave to amend is not warranted. Accordingly, the Court recommends this case be dismissed for failure to state a claim and Plaintiff's Application to Proceed *In Forma Pauperis* (IFP) be denied.

**I. Background**

In the proposed complaint, Plaintiff, a pretrial detainee housed in the Kitsap County Jail ("Jail"), alleges his rights were violated by Paul Thimons, his defense attorney. Dkt. 4-1.

Specifically, Plaintiff asserts Thimons harassed and questioned Plaintiff about filing a civil lawsuit. *Id.* Plaintiff also names Thimons Law PLLC as a defendant. *Id.*

## II. Discussion

Under the Prison Litigation Reform Act of 1995, the Court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The Court must “dismiss the complaint, or any portion of the complaint, if the complaint: (1) is frivolous, malicious, or fails to state a claim upon which relief may be granted; or (2) seeks monetary relief from a defendant who is immune from such relief.” *Id.* at (b); 28 U.S.C. § 1915(e)(2); *see Barren v. Harrington*, 152 F.3d 1193 (9th Cir. 1998).

To state a claim for relief under 42 U.S.C. § 1983, a plaintiff must show: (1) he suffered a violation of rights protected by the Constitution or created by federal statute, and (2) the violation was proximately caused by a person acting under color of state law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The first step in a § 1983 claim is therefore to identify the specific constitutional right allegedly infringed. *Albright v. Oliver*, 510 U.S. 266, 271 (1994).

To satisfy the second prong, a plaintiff must allege facts showing how individually named defendants caused, or personally participated in causing, the harm alleged in the complaint. *See Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988); *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A person subjects another to a deprivation of a constitutional right when committing an affirmative act, participating in another’s affirmative act, or omitting to perform an act which is legally required. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). Sweeping conclusory allegations against an official are insufficient to state a claim for relief. *Leer*, 844 F.2d

1 at 633-34. Further, a § 1983 suit cannot be based on vicarious liability alone, but must allege the  
2 defendant's own conduct violated the plaintiff's civil rights. *City of Canton v. Harris*, 489 U.S.  
3 378, 385-90 (1989).

4 Plaintiff alleges claims against Paul Thimons, his defense attorney, and Thimons Law  
5 PLLC. Dkt. 4-1. As stated above, to state a claim for relief under § 1983, Plaintiff must "plead that  
6 (1) the defendants acting under color of state law (2) deprived [him] of rights secured by the  
7 Constitution or federal statutes." *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986). The  
8 United States Supreme Court has held that court-appointed criminal defense attorneys are not  
9 state actors, and therefore, are not subject to § 1983 liability when they are acting in the capacity  
10 of an advocate for their clients. A "lawyer representing a client is not, by virtue of being an  
11 officer of the court, a state actor 'under the color of state law' within the meaning of § 1983."  
12 *Polk Cty. v. Dodson*, 454 U.S. 312, 318 (1981). While it is not clear if Defendant Thimons was  
13 appointed by the state court to represent Plaintiff, it is clear Defendants Thimons and Thimons  
14 Law, PLLC, as Plaintiff's criminal defense attorneys, are not state actors. Therefore, they cannot  
15 be liable under § 1983 and Plaintiff has failed to state a claim against them.

### 16 **III. Leave to Amend**

17 Unless it is absolutely clear that no amendment can cure the defect, a *pro se* litigant is  
18 entitled to notice of the complaint's deficiencies and an opportunity to amend prior to dismissal  
19 of the action. *See Lucas v. Dep't of Corr.*, 66 F.3d 245, 248 (9th Cir. 1995). Here, any attempt by  
20 Plaintiff to amend the proposed complaint would be futile. The named defendants are not proper  
21 and additional allegations against these defendants would not cure the deficiencies. As such, the  
22 Court finds Plaintiff should not be afforded leave to amend his proposed complaint.

## IV. Conclusion

For the above stated reasons, the Court finds Plaintiff has failed to state a claim upon which relief can be granted and leave to amend would be futile. Therefore, the Court recommends this case be dismissed and the dismissal count as a “strike” under 28 U.S.C. §1915(g). The Court also recommends Plaintiff’s Application to Proceed IFP be denied.

Objections to this Report and Recommendation, if any, should be filed with the Clerk and served upon all parties to this suit not later than **fourteen (14) days** from the date on which this Report and Recommendation is signed. Failure to file objections within the specified time may affect your right to appeal. Objections should be noted for consideration on the District Judge's motions calendar **fourteen (14) days** from the date they are filed. Responses to objections may be filed by **the day before the noting date**. If no timely objections are filed, the matter will be ready for consideration by the District Judge on **October 9, 2024**.

Dated this 18th day of September, 2024.

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David W. Christel  
United States Magistrate Judge